

1 International Criminal Court

2 Appeals Chamber

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/06

4 Judgement - Open Session

5 Friday, 11 July 2008

6 The hearing starts at 3.01 p.m.

7 COURT USHER: All rise. Please be seated.

8 PRESIDING JUDGE PILLAY: Good afternoon. Will the Court Officer
9 please call the first matter on the roll.

10 COURT OFFICER: Thank you, Madam President. The Situation in the
11 Democratic Republic of the Congo, the case of the Prosecutor versus
12 Thomas Lubanga Dyilo.

13 PRESIDING JUDGE PILLAY: Thank you. I am conducting these
14 proceedings in my capacity as Presiding Judge in this case pursuant to
15 the internal Rules of the Appeals Division which were recently changed.

16 Will counsel for the parties and the Legal Representatives of
17 Victims participating in these appeals kindly place themselves on record.
18 That is the Prosecution, Defence, And Victims.

19 Prosecution.

20 MR. GUARIGLIA (interpretation): Good morning, Madam President.
21 It's Fabricio Guariglia, senior appeals counsel; appearing together with
22 Ekkehard Withopf, senior attorney in the Lubanga case; and Mr. Reinhold
23 Gallmetzer, appeals counsel.

24 PRESIDING JUDGE PILLAY: Thank you, Mr. Fabricio.

25 MR. DESALLIERS (interpretation): Good afternoon, your Honour. I

1 am Marc Desalliers, and I am accompanied by Caroline Buteau and other
2 representatives of the Defence.

3 MS. MASSIDDA (interpretation): Good afternoon, Madam President.
4 Paolina Massidda, principle counsel of the Office of Public Counsel for
5 Victims, appearing today on behalf of Mr. Luc Walley. The power of
6 attorney has been filed in the case record yesterday. Thank you.

7 PRESIDING JUDGE PILLAY: Thank you. Thank you for the presence
8 of all counsel.

9 I will now proceed to read -- I'm sorry.

10 MS. BAPITA (interpretation): Thank you, your Honour. I am
11 Ms. Bapita, and I am representing the interests a/0106/06.

12 PRESIDING JUDGE PILLAY: I will read the summary of the
13 judgement.

14 The Appeals Chamber delivers its judgement in the appeals of the
15 Prosecutor and the Defence against the decision of Trial Chamber I
16 entitled "Decision on Victims Participation" of 18th January, 2008. The
17 judgement is rendered by majority decision with partly dissenting
18 opinions of Judge Georgios Pikis and Judge Kirsch. A summary of Judge
19 Pikis's opinion will be delivered by me today together with a summary of
20 the majority judgement. The dissenting opinion of Judge Kirsch will be
21 filed in due course.

22 I will now proceed to deliver a summary. The judgement dated 11
23 July 2008, and not the summary is the authoritative text.

24 Procedural history. On the 28th of January, 2008, the Defence
25 and the Prosecutor sought leave to appeal the impugned decision. On 26th

1 February 2008, the Trial Chamber granted leave to appeal on three issues
2 which the Trial Chamber identified as follows: The first issue, whether
3 the notion of "victim" necessarily implies the existence of personal and
4 direct harm.

5 Second issue, whether the harm alleged by a victim and the
6 concept of personal interests under Article 68 of the Statute must be
7 linked with the charges against the accused.

8 And third issue, whether it is possible for victims participating
9 at trial to lead evidence pertaining to the guilt or innocence of the
10 accused and to challenge the admissibility or relevance of evidence.

11 I will now go on to look at these three issues individually. The
12 first issue, whether the notion of "victim" necessarily implies the
13 existence of personal and direct harm.

14 In relation to this issue, the Trial Chamber had ruled that the
15 Rome Statute framework does not provide a definition of the concept of
16 harm under Rule 85 of the Rules of Procedure and Evidence, and applying a
17 purpose of interpretation, it concluded that people can be the direct or
18 indirect victims of a crime within the jurisdiction of the court.

19 The Defence argument was that the appeal against this issue --
20 anyway, the appeal against this issue was lodged by the Defence alone.
21 The Prosecutor is opposed to the Defence's appeal on this issue.

22 The Defence maintain that the notion of "victim" necessarily
23 implies the existence of personal and direct harm as articulated in
24 national and international laws. In relation to the concept of indirect
25 harm, the Defence submit that nowhere in the Statute or the Rules is it

1 expressly stated that indirect harm may constitute a reason for
2 permitting victim participation. The Defence further argued that the
3 Trial Chamber erred in adopting the wording of principle 8 of the basic
4 principles and guidelines on the right to a remedy and reparation for
5 victims of gross violations of international human rights law and serious
6 violations of international humanitarian law which basic principles was
7 adopted by the UN general assembly Resolution 60/147 on the 16th December
8 2005.

9 So the Defence argued that the Chamber erred in adopting the
10 wording of these principles, particularly principle 8, to conclude that a
11 victim may suffer either individually or collectively from harm.

12 The Prosecutor's argument. The Prosecutor argued that the Trial
13 Chamber, that it would consider is there evidence that the applicant
14 suffered any harm. Accordingly, he submits that the Defence's argument
15 does not relate to any alleged error in the impugned decision and must be
16 rejected.

17 The Prosecutor further submits that the Trial Chamber was correct
18 not to exclude from the notion of "victims" persons who were not the
19 direct targets the crime but who suffered indirect harm as a result of
20 the commission of the crime.

21 Victims' observations. The Legal Representatives concur with the
22 submissions of the Prosecutor in this regard.

23 The Appeals Chamber's determination. The Appeals Chamber notes
24 that "Rule 85(b) of the Rules limits the definition of organisational or
25 institutional victims to those that have suffered direct harm to any of

1 their property." The type of harm referred to relates to organisations
2 or institutions rather than natural persons. It is therefore different
3 from the type of harm set out in Rule 85(a) of the Rules, which is harm
4 to natural persons.

5 The word "harm" in its ordinary meaning denotes hurt, injury, and
6 damage. It carries the same meaning in legal texts denoting injury,
7 loss, or damage, and that is the meaning of harm in Rule 85(a) of the
8 Rules.

9 The Appeals Chamber considers that the harm suffered by a person
10 is harm to that natural person, that is, personal harm. Material,
11 physical, and psychological harm are all forms of harm that fall within
12 the Rule if they are suffered personally by the victim. Harm suffered by
13 one victim as a result of the commission of a crime within the
14 jurisdiction of the court can give rise to harm suffered by other
15 victims. This is evidence -- this is evident, for instance, when there
16 is a close personal relationship between the victims, such as the
17 relationship between a child soldier and the parents of that child. The
18 recruitment of a child soldier may result in personal suffering of both
19 the child concerned and the parents of that child. It is in this sense
20 that the Appeals Chamber understands the Trial Chamber's statement that
21 "People can be the direct or indirect victims of a crime within the
22 jurisdiction of the court."

23 The issue for determination is whether the harm suffered is
24 personal to the individual. If it is, it can attach to both direct and
25 indirect victims.

1 Whether or not a person has suffered harm as a result of a crime
2 within the jurisdiction of the court and is therefore a victim before the
3 court, would have to be determined in light of the particular
4 circumstances.

5 The Appeals Chamber finds no error in the Trial Chamber's
6 reference to the basic principles of 2005 for the purpose of guidance.
7 Harm could be both personal and collective in nature. The fact that harm
8 is collective does not mandate its inclusion or its exclusion in the
9 establishment of whether a person is a victim before the court. The
10 issue for determination is whether the harm is personal to the individual
11 victim.

12 Accordingly, on the first issue, firstly the decision of the
13 Trial Chamber is confirmed to the extent that the Trial Chamber decided
14 that for the purposes of Rule 85(a) the harm suffered by victims does not
15 necessarily have to be direct. And two, the decision of the Trial
16 Chamber is amended such that the Appeals Chamber also finds that the harm
17 suffered under Rule 85(a) must necessarily be personal harm.

18 I move now to the second issue on appeal, which is whether the
19 harm alleged by a victim and the concept of personal interests under
20 Article 68 of the Statute must be linked with the charges against the
21 accused. This issue is being appealed by both the Prosecutor and the
22 Defence.

23 In relation to this issue, the Trial Chamber held that Rule 85 of
24 the Rules does not have the effect of restricting the participation of
25 victims to the crimes contained in the charges, and this distinction is

1 not provided for in the Rome Statute framework.

2 In addition, the Trial Chamber held that following an initial
3 determination that a victim shall be allowed to participate in the
4 proceedings, thereafter, in order to participate at any specific stage in
5 the proceedings, a victim will be required to show the reasons why his or
6 her interests are affected by the evidence or issue then arising in the
7 case.

8 The Prosecutor submitted that the Trial Chamber erred in its
9 approach to the requirement for participation. The Prosecutor contends
10 that victim participation in the trial proceedings must be determined
11 within the competency of the Trial Chamber, which competency is limited
12 to the parameters set out in the charges.

13 The Defence similarly argued that the Trial Chamber's
14 jurisdiction is defined by the parameters set out in the charges against
15 the accused. The Defence submitted that by not requiring a link between
16 a victim's status and his or her participatory rights, on the one hand,
17 to the charges against the accused would result in an infringement of the
18 principle of legality.

19 Victims' observations. The Legal Representatives of Victims,
20 authorised to participate in the appeals, confirm that in their case the
21 harm suffered, as well as their personal interest, are directly
22 correlated with the charges against Mr. Lubanga.

23 The Appeals Chamber's determination of this issue. On a
24 contextual interpretation of Rule 85, the Appeals Chamber determines that
25 whilst the ordinary meaning of Rule 85 does not per se limit the notion

1 of "victims" to the victims of the crimes charged. The effect of Article
2 68(3) of the Statute is that the participation of victims in the trial
3 proceedings pursuant to the procedure set out in Rule 89(1) of the Rules
4 is limited to those victims who are linked to the charges. Victim
5 applicants will have to demonstrate that their personal interests are
6 affected by the trial in order to be permitted to present their views and
7 concerns at stages of the proceedings determined to be appropriate by the
8 court and in a manner which is not prejudicial to or inconsistent with
9 the rights of the accused and a fair and impartial trial.

10 Given that the purpose of trial proceedings is the determination
11 of the guilt or innocence of the accused person of the crimes charged and
12 that the application under Rule 89(1) of the Rules in this context is for
13 participation in the trial, only victims of these crimes will be able to
14 demonstrate that the trial as such affects their personal interests.
15 Therefore, only victims who are victims of the crimes charged may
16 participate in the trial proceedings pursuant to Article 68(3) of the
17 Statute read with Rule 85 and 89(1) of the Rules.

18 Accordingly, on the second issue the Appeals Chamber reverses the
19 finding of the Trial Chamber and affirms that for the purposes of
20 participation in the trial proceedings, the harm alleged by a victim and
21 the concept of personal interest under Article 68(3) of the Statute must
22 be linked with the charges confirmed against the accused.

23 I move now to the third issue identified for appeal, which is
24 whether it is possible for victims participating at trial to lead
25 evidence pertaining to the guilt or innocence of the accused and to

1 challenge the admissibility or relevance of evidence.

2 The third issue certified for appeal by the Trial Chamber
3 comprises two sub-issues; namely, one, whether it is possible for victims
4 participating at trial to lead evidence pertaining to the guilt or
5 innocence of the accused; and two, whether it is possible for victims
6 participating at trial to challenge the admissibility or relevance of
7 evidence. These issues are being appealed by both the Prosecutor and the
8 Defence who submit that the Trial Chamber erred in its determination in
9 respect of both sub-issues.

10 The ruling of the Trial Chamber. In establishing a framework for
11 the rights of victims participating at trial to lead evidence and to
12 challenge the admissibility or relevance of evidence, the Trial Chamber
13 stated at paragraph 108 of the impugned decision that: "Victims
14 participating in the proceedings may be permitted to tender and examine
15 evidence if in the view of the Chamber it will assist in the
16 determination of the truth and if in this sense the court has requested
17 the evidence."

18 At paragraph 109 of the impugned decision, the Chamber stated
19 further that: "There is no provision within the Rome Statute framework
20 which prohibits the Trial Chamber from ruling on the admissibility or
21 relevance of evidence having taken into account the views and concerns of
22 the victims in accordance with Article 68(3) and 69(4) of the Statute.
23 In appropriate circumstances, this will be allowed following an
24 application."

25 Earlier in the impugned decision at paragraph 96, the Trial

1 Chamber decided that: "In order to participate at any specific stage in
2 the proceedings, example, during the examination of a particular witness
3 or the discussion of a particular legal issue or type of evidence, a
4 victim will be required to show in a discrete written application the
5 reasons why his or her interests are affected by the evidence or issue
6 then arising in the case and the nature and extent of the participation
7 they seek."

8 In his argument, the Prosecutor contends that the Trial Chamber
9 committed a legal error when it held that victims may introduce evidence
10 pertaining to the guilt or innocence of the accused and to the extent
11 that it permits victims to challenge the admissibility or relevance of
12 evidence. The Prosecutor advanced four arguments in relation to the
13 first sub-issue. These are, inter alia, that victims are not parties and
14 that their role and rights differ from that of the Prosecution and the
15 Defence; that victims have a right to express their views and concerns,
16 which right does not constitute the submission of evidence; that the
17 Trial Chamber erred in linking the modalities of victim participation not
18 to the victim-specific provisions of Article 68 of the Statute but to
19 provisions regulating the functions and powers of the Chambers.

20 In its argument, the Defence submitted that the Trial Chamber
21 erred in allowing victims to lead evidence pertaining to the guilt or
22 innocence of the accused and to challenge the admissibility and relevance
23 of evidence on the basis that such a right belongs to the parties. In
24 addition, the Defence submitted that such an approach would mean that the
25 accused would have to confront more than one accuser, thus violating the

1 principle of equality of arms.

2 Victims' observations. The Legal Representatives of the Victims
3 participating in the appeal assert that the documents of the court
4 indirectly grant victims the possibility of presenting evidence going to
5 the guilt or innocence of the accused and, further, that the issue of
6 guilt or innocence directly affects the victims, and it is for the
7 Chamber to ensure that the intervention of victims remains appropriate
8 and that they do not take the place of the Prosecutor or the Defence.

9 Now to the Appeals Chamber's determination of this issue.

10 The right to lead evidence pertaining to the guilt or innocence
11 of the accused and to challenge the admissibility or relevance of
12 evidence lies primarily with the parties, namely the Prosecutor and the
13 Defence. The Rome Statute framework contains numerous provisions which
14 support this interpretation such as those provisions pertaining to the
15 role assigned specifically to the Prosecutor.

16 Presumptively, it is the Prosecutor's function to lead evidence
17 of the guilt of the accused, because the onus is on the Prosecutor to
18 prove the guilt of the accused. However, the Appeals Chamber does not
19 consider that these provisions preclude the possibility for victims to
20 lead evidence pertaining to the guilt or innocence of the accused and to
21 challenge the admissibility or relevance of evidence during the trial
22 proceedings.

23 While mindful that the Prosecutor bears the onus of proving the
24 guilt of the accused, it is nevertheless clear that the court has the
25 authority to request the submission of all evidence that it considers

1 necessary for the determination of the truth under Article 69(3) of the
2 Statute. The fact that the onus lies on the Prosecutor cannot be read to
3 exclude the statutory powers of the court as it is the court that "must
4 be convinced of the guilt of the accused beyond reasonable doubt in terms
5 of Article 66(3) of the Statute."

6 To give effect to the spirit and intention of Article 68(3) of
7 the Statute in the context of the trial proceedings, it must be
8 interpreted so as to make participation by victims meaningful. Evidence
9 to be tendered at trial which does not pertain to the guilt or innocence
10 of the accused would most likely be considered inadmissible and
11 irrelevant.

12 If victims were generally and under all circumstances precluded
13 from tendering evidence relating to the guilt or innocence of the accused
14 and precluded from challenging the admissibility or relevance of
15 evidence, their right to participate in the trial would potentially
16 become ineffectual.

17 The Trial Chamber has correctly identified the procedure and
18 confined limits within which it will exercise its powers to permit
19 victims to tender and examine evidence and these are in summary; one, a
20 discrete application; two, notice to the parties; three, demonstration of
21 personal interests that are affected by the specific proceedings; four,
22 compliance with disclosure obligations and protection orders; five,
23 determination of appropriateness; and six, consistency with the rights of
24 the accused and a fair trial.

25 With these safeguards in place, the grant of participatory rights

1 to victims to lead evidence pertaining to the guilt or innocence of the
2 accused and to challenge the admissibility or relevance of the evidence
3 is not inconsistent with the onus on the Prosecutor to prove the guilt of
4 the accused, nor is it inconsistent with the rights of the accused and a
5 fair trial. In so doing, the Trial Chamber did not create an unfettered
6 right for victims to lead or challenge evidence. Instead, victims are
7 required to demonstrate why their interests are affected by the evidence
8 or issue upon which the Chamber will decide, on a case-by-case basis,
9 whether or not to allow such participation.

10 Accordingly, on the third issue the Appeals Chamber confirms the
11 decision of the Trial Chamber allowing participating victims the
12 possibility to lead evidence pertaining to the guilt or innocence of the
13 accused and to challenge the admissibility or relevance of evidence in
14 the trial proceedings.

15 I will now proceed to read a summary of the partly dissenting of
16 Judge Pikis in this case.

17 Judge Pikis joined the majority judgement in relation to the
18 resolution of the second issue on appeal and partly with the answer given
19 to the first issue on appeal. To qualify as a victim, he stressed, the
20 harm suffered must be the direct effect of a crime the cause of the harm,
21 harm understood is as hurt, injury, and damage encompassing material,
22 physical, and psychological harm.

23 Judge Pikis dissented from the majority judgement in relation to
24 the resolution of the third issue on appeal. In his view, victims
25 participating at the trial cannot lead evidence pertaining to the guilt

1 or innocence of the accused or challenge the admissibility or relevance
2 of evidence. The Statute envisages an adversarial hearing which is the
3 norm of a fair trial. Disclosure of Prosecution evidence prior to the
4 trial is the right of the accused, an essential element for the
5 preparation of the Defence. The adversarial system leaves no room for
6 anyone other than the Prosecutor and the Defence to take part in the
7 proof of the case against the accused. The defendant cannot have more
8 than one accuser.

9 The accused is presumed to be innocent. The ultimate question in
10 the criminal proceedings before the court is whether the Prosecution
11 proved its case beyond reasonable doubt, and as the adduction of evidence
12 on the guilt or innocence of the accused or questions referable to the
13 relevance and admissibility of evidence are solely referable to the proof
14 of the criminal case against the accused, no one other than the two
15 adversaries can have a say on these matters.

16 That concludes the summary of the judgement and dissent. I now
17 declare this session closed but do remind you that the next session will
18 begin very shortly.

19 Thank you.

20 COURT USHER: All rise.

21 The hearing ends at 3.37 p.m.

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